

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

OCT 17 2007

COURT OF APPEALS
DIVISION TWO

ASHLEY SKINNER,

Petitioner,

v.

HON. JANNA L. VANDERPOOL, Judge
of the Superior Court of the State of
Arizona, in and for the County of Pinal,

Respondent,

and

THE STATE OF ARIZONA,

Real Party in Interest.

2 CA-SA 2007-0081

DEPARTMENT B

DECISION ORDER

SPECIAL ACTION PROCEEDING

Pinal County Cause No. CR200700136

JURISDICTION ACCEPTED; RELIEF GRANTED

Marc J. Victor, P.C.

By Marc J. Victor

Chandler
Attorney for Petitioner

James P. Walsh, Pinal County Attorney

By William J. Carter

Florence
Attorneys for Real Party in Interest

¶1 Petitioner Ashley Skinner was charged by indictment in the underlying proceeding with conspiracy to commit first-degree murder and first-degree, premeditated murder. She filed a motion to remand the charges to the grand jury for a new determination of probable cause pursuant to Rule 12.9, Ariz. R. Crim. P., which the respondent judge denied. Ashley challenges that ruling in this special action. Generally, challenges to grand jury proceedings are not “reviewable on appeal.” *State v. Moody*, 208 Ariz. 424, ¶ 31, 94 P.3d 1119, 1134-35 (2004); *see also State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995) (if defendant’s motion for new finding of probable cause is denied, relief may only be sought “before trial by special action”). Because Ashley does not have an equally plain, speedy, or adequate remedy by appeal, we accept jurisdiction of this special action, *see* Rule 1(a), Ariz. R. P. Spec. Actions, and, because the respondent judge abused her discretion, we grant relief. *See* Ariz. R. P. Spec. Actions 3(c).

¶2 Detective Francisco Alanis of the Casa Grande Police Department testified before the grand jury. He described the investigation he and other officers had conducted of a murder that had occurred early in the morning on January 12, 2007. Their investigation led them to seven suspects, including Ashley. Alanis testified he had learned through various sources, including Jacinto Perez, that there had been a meeting the night before the shooting at the home of Avon Skinner and that those present had planned the victim’s murder for the next day. Various weapons were passed around during the meeting. Alanis included Ashley among the individuals who had attended this meeting.

¶3 Alanis further testified that, according to Jacinto, around 5:00 the next morning, Ashley had picked up the same group of individuals and had driven them to an area near the victim's home. Three of the individuals, Mark Burgess, Michael Burgess, and Brandon Dickson, jumped a fence, walked up to the victim's door, knocked, and began shooting when the victim opened the door. Ashley waited by a tree, and others watched from nearby. The group ran back to Ashley's car after the shooting, and they all drove away. Alanis testified the group then went to Alicia Skinner's home, "unloaded the weapons, [and] started cleaning them." Although Alanis testified that he did not find weapons matching the ballistics or descriptions of those used during the shooting, he said he had found a shotgun when he searched Ashley's residence pursuant to a warrant. He deemed that discovery "consistent with Jacinto's statement that a shotgun was being passed around at Avon Skinner's apartment."

¶4 In her motion for a redetermination of probable cause, Ashley claimed two portions of Alanis's testimony were significantly inaccurate. First, Ashley had not been among those who attended the meeting on the night of January 11. Second, the shotgun was actually found at Alicia Skinner's house, not Ashley's. The state concedes that Alanis twice had confused Ashley with her sister Alicia in both respects. It urged the respondent judge to deny Ashley's motion nevertheless, insisting she had not been denied a substantial procedural right because other evidence was more than sufficient to support the grand jury's finding that there was probable cause to believe Ashley had been involved in the victim's

murder. Additionally, the state argued, Alanis's misstatements had been inadvertent. The respondent judge denied the motion, finding

the issues raised in the Defendant's . . . motion . . . do not support a finding of a procedural defect at presentation sufficient to Remand the case back for a new finding of probable cause, rather they are factual in nature and would require this Court to make findings of fact unsupported by the record.

¶5 Rule 12.9(a), Ariz. R. Crim. P., provides, in relevant part, that “grand jury proceedings may be challenged only by motion . . . alleging that the defendant was denied a substantial procedural right” As our supreme court stated in *Crimmins v. Superior Court*, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983), “due process . . . requires the use of an unbiased grand jury and a fair and impartial presentation of the evidence.” In *Crimmins*, one of three cases on which Ashley primarily relies, the supreme court reversed the trial court's denial of a motion to remand the case to the grand jury for a new finding of probable cause. It found the defendant had been denied due process because the state's witness had testified inaccurately and the prosecutor had omitted certain relevant instructions.

¶6 In *Korzep v. Superior Court*, 155 Ariz. 303, 746 P.2d 44 (App. 1987), on which Ashley also relies, Division One of this court reversed the trial court's denial of the defendant's Rule 12.9 motion, which alleged that the police officer who had testified before the grand jury had mischaracterized a pathologist's opinions. Relying on *Crimmins*, the court concluded, “It is not the sufficiency of the evidence which was presented to the grand jury that is questioned, but its inaccuracy which renders the decision of the grand jury less

than fair and impartial.” 155 Ariz. at 306, 746 P.2d at 47. The court reasoned that in determining whether a case must be returned to the grand jury, the first inquiry is the materiality of the objectionable testimony. If it is material, the court stated, the question is whether there is “a high probability that the grand jury would not have indicted had they heard the testimony of the expert declarant rather than a hearsay version” *Id.* at 306, 746 P.2d at 47. Finding there was such a probability in *Korzep*, the court reversed.

¶7 Similarly, in *Nelson v. Royston*, 137 Ariz. 272, 277, 669 P.2d 1349, 1354 (App. 1983), this court found the trial court had abused its discretion when it denied the defendant’s Rule 12.9 motion because misleading information had been introduced, which had denied the defendant “substantial due process.” And, we noted, it is irrelevant that the introduction of inaccurate information was inadvertent. *Id.*

¶8 The state has not meaningfully distinguished these cases. The issue is not whether there was sufficient evidence apart from the inaccurate testimony to support a finding of probable cause, but whether the presentation of evidence was unfair and denied Ashley a substantial procedural right. *See Crimmins*, 137 Ariz. at 43, 668 P.2d at 842. Although the respondent judge’s order is somewhat unclear, she appears to have considered the sufficiency of the remaining evidence or perhaps to have believed she could not grant the motion without improperly weighing evidence. To the extent she believed she would be required to engage in impermissible fact-finding about whether inaccurate information had been presented to the grand jury, she was mistaken in light of the state’s concession.

¶9 The relevant, threshold inquiry here is whether the inaccuracies in Alanis's testimony were material. Clearly they were. Whether Ashley had attended the meeting that was the basis for the conspiracy charge was material to that charge as well as to the charge of first-degree murder, given Alanis's testimony that the same group had then carried out their plan together the next day. Whether a shotgun had been found at Ashley's home was equally material, particularly in light of the evidence that a shotgun had been passed around during the meeting. That police had not yet determined which weapon had caused the victim's death does not, as the state suggests, minimize the inculpatory strength of that evidence. The evidence of Ashley's involvement in the conspiracy and the premeditated murder apart from the erroneous information cannot be characterized as overwhelming. Thus, we cannot say that the introduction of incorrect evidence here was harmless beyond a reasonable doubt. *See Pitts v. Adams*, 179 Ariz. 108, 876 P.2d 1143 (1994). Moreover, as we have noted, it is not the sufficiency of the evidence presented to the grand jury that is questioned, but its inaccuracy that undermines the grand jury's role in rendering a fair and impartial decision. *Korzep*, 155 Ariz. at 306, 746 P.2d at 47.

¶10 We conclude that the grand jury proceeding was not "fair and impartial" because the state introduced inaccurate, material evidence, without which Ashley might well not have been indicted. *Crimmins*, 137 Ariz. at 41, 668 P.2d at 884; *Korzep*, 155 Ariz. at 306, 746 P.2d at 47. Ashley was thereby denied a substantial procedural right, and the

respondent judge abused her discretion by denying Ashley's motion to remand the charges to the grand jury for a new finding of probable cause.

¶11 The respondent judge's order denying Ashley's motion pursuant to Rule 12.9 is reversed.

GARYE L. VÁSQUEZ, Judge

Presiding Judge Eckerstrom and Judge Espinosa concurring.